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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies Concerning	)	
Multiple Ownership of Radio Broadcast	)	MM Docket No. 01-317
Stations in Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. ~~00-224~~ 00-244

REPLY COMMENTS OF THE OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST

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SUMMARY

The Office of Communication, Inc. of the United Church of Christ ("UCC") again urges the Commission to enforce its public interest mandate to preserve diversity, localism and competition in local radio markets. In initial comments, UCC submitted a survey of 33 local radio markets that detailed large declines in ownership diversity and huge increases in the levels of concentration in almost all markets studied. In order to protect the listening public, and fully enforce the Commission's public interest mandate, UCC proposed that the Commission adopt a bright-line test for local radio mergers. Under this standard, the Commission would screen transactions to determine whether a proposed merger would result in one group controlling thirty-five percent, or two station groups controlling sixty percent, of either the local audience share or radio advertising share within a local Arbitron Metro Market or comparable geographic market area ("35/60 test").

In these reply comments, UCC respond to three main assertions of industry commenters. First, UCC responds to the assertions of Clear Channel, Viacom and others that Section 202(b) of the 1996 Act overrides the Commission's traditional public interest and competition mandate. The legislative history of Section 202(b), when read in its entirety, strongly suggests that Section 202(b) was meant to set presumptive limits on local radio ownership, not to impair or modify the Commission's public interest or competition mandate. Therefore, under long-established principles of statutory interpretation, the Commission must read Section 202(b) and its public interest and competition mandates together, and continue to ensure that radio transfers serve the listening public, as well as promote competition.

Second, UCC responds to a study commissioned by the NAB, and conducted by BIA Financial Network, which purports to show that ownership consolidation has led to more "programming diversity." As a preliminary matter, UCC notes that the NAB/BIA Study contains a number of methodological errors, such as the failure to coherently identify the number and types of "formats" used to classify stations, the inclusion of "out-of-market" stations in its "local" market analysis, and various flaws in the regression analysis used to calculate results. However, even assuming that the data in the study is correct, it is critical to note that the study only "found" that an average of one format per market was added between 1996 and 2002. The study also provides little to no evidence showing that this format "increase" is due to ownership consolidation. Moreover, even if consolidation results in more formats, it has been Commission policy for the last 25 years that it is locally responsive issue-oriented programming – not format – that is relevant in determining whether a station owner has served the public interest. None of the studies presented, however, show that ownership consolidation has increased local news, public affairs or other informational programming. In addition, some commenters have shown that ownership consolidation has led to a decrease in the number of minority and female-owned stations and their unique viewpoints.

Finally, UCC responds to certain claims presented in a study conducted by David Pritchard, which were submitted by Viacom in support of its claim that radio limits are no longer necessary. The Viacom/Pritchard Study asserts that the public has more access to locally-oriented media than ever before. The Viacom/Pritchard Study, however, relies on extremely questionable analysis to reach this conclusion. First, the study states that it looked at all the "media" within five U.S. markets. However, the study fails to even list what media "entities" were included in the study. Second, the study appears to count all "outlets" as separate voice, rather than just looking at those that are independently owned. Third, and perhaps most significantly, it appears that many of the new media "entities" identified in the study are websites. However, the study makes no showing that the websites contain locally-originated programming, or that they are used by a significant number of people. Thus, the Viacom/Pritchard Study, like the NAB/BIA study, provides no basis for further relaxation of the radio ownership rules.

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REPLY COMMENTS OF THE OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST

The Office of Communication, Inc. of the United Church of Christ ("UCC"),[1] through undersigned counsel, hereby submits the following reply comments pursuant to the Commission's Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking concerning local radio ownership rules and policies.[2]

In its initial comments, UCC urged the Commission to implement certain rule and policy changes that would help preserve at least some degree of diversity and competition in local radio markets. Specifically, UCC urged the Commission to adopt a "bright-line"standard for local

[1]The United Church of Christ is a not-for-profit religious organization formed in 1957. It has approximately 1.4 million members who make up over 6,000 congregations in the United States and Puerto Rico. The Office of Communication, Inc. of the United Church of Christ is responsible for developing the Church's policy towards mass media. UCC has actively defended the public's rights in the field for over 30 years. UCC has also participated in numerous FCC and judicial proceedings representing the rights of the viewing and listening public.

[2]*See* Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Notice of Proposed Rule Making and Further Notice of Proposed Rule Making, MM Docket No. 01-317 (rel. Nov. 9, 2001) (hereinafter "Notice"); *see also* Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Order, MM Docket 01-317, DA 02-946 (rel. April 23, 2002) (extending the deadline for reply comments to May 8, 2002).

radio station transactions. Under this standard, mergers that would result in one station group controlling thirty-five percent, or two station groups controlling sixty percent, of either the local audience or advertising share within a local Arbitron Metro Market or its geographic substitute ("35/60 test") would create a rebutable presumption that the merger is contrary to the public interest. In addition, transactions exceeding the limits of the "35/60" test would be subject to additional advertising and outreach requirements to ensure that local listeners are aware of the proposed transaction and have an opportunity to voice their opinions.

In these reply comments, UCC responds to the assertions of certain parties concerning the interaction between Section 202(b), and the Commission's other statutorily required public interest and antitrust obligations. In addition, UCC also details a number of substantial methodological and analytical problems with both the National Association of Broadcasters/BIA Financial Network Format Study, which attempts to equate ownership consolidation with "programming diversity," and the Viacom/Pritchard Study, which looks at the number of media outlets in five U.S. media markets.

I. Section 202(b) Does Not Affect The Commission's Traditional Public Interest and Competition Analysis of Local Radio Mergers

In initial comments, certain industry commenters suggest that Section 202(b) of the Telecommunications Act of 1996[3] prohibits the Commission from conducting any review of radio station license transfer applications except to ensure that the applications fall within Section 202(b)'s numerical ownership limits.[4] The National Association of Broadcasters

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[3]Pub. L. No. 104-104, §202(b), 110 Stat. 110.

[4]*See, e.g.*, Comments of Clear Channel Communications, Inc. at 4-13 (hereinafter "Clear Channel Comments"); Comments of the National Association of Broadcasters at 4-15

("NAB"), for example, states that "the Commission lacks the authority to override [Congress'] judgments by preventing radio station transactions that are expressly permissible under Section 202(b)(1)."[5] Similarly, Clear Channel requires the "Commission to implement specific, numerical caps" on local radio ownership.[6] As detailed below, such an interpretation of Section 202(b) completely misreads the legislative history underpinning Section 202(b) and misapplies fundamental principles of statutory interpretation.

A. The Legislative History of Section 202(b) Does Not Indicate Any Intention of Congress to Restrict the Commission's Traditional Public Interest and Competition Analysis

In initial comments, Clear Channel asserts that Section 202(b) "is a definitive congressional determination of the level of local radio ownership that is consistent with the public interest in diversity and, especially, competition."[7] This statement, however, ignores the nature of the radio ownership compromise that occurred in negotiations between the House and the Senate and resulted in Section 202(b). While Clear Channel is correct in stating that the House bill would have broadly deregulated radio ownership,[8] it mischaracterizes provisions of

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(hereinafter "NAB Comments"); Comments of Radio One, Inc. at 3-6 (hereinafter "Radio One Comments").

[5]NAB Comments at 4-5.

[6]Clear Channel Comments at 5.

[7]*Id.* at 8.

[8]H.R. 1555, 104th Cong. § 337(a)(1) (1995) (stating that "[e]xcept as expressly permitted in this section, the Commission shall not prescribe or enforce any regulation . . . prohibiting or limiting, either nationally or within any particular area, a person or entity from holding any form of ownership or other interest in two or more broadcasting stations. . . .").

the Senate Bill addressing radio station ownership.[9]

Section 206(b)(2) of the Senate bill would have required the Commission to remove fixed national and local radio station limits.[10] Section 206(b)(2), however, also contained a provision that specifically stated that the "Commission may refuse to approve the transfer or issuance of an AM or FM broadcast license to a particular entity if it finds that the entity would obtain an undue concentration of control or would thereby harm competition."[11] Clear Channel states that this provision would have allowed the Commission to conduct only "a case-by-case analysis *focused on its traditional competition concerns*."[12] This statement, however, ignores the "undue concentration of control" clause in Section 206(b)(6), which evidenced concern over diversity, as opposed to the last clause of the sentence "or would thereby harm competition," which emphasized competitive concerns.[13] Accordingly, a complete and thorough reading of Section 206(b)(2) illustrates the fact that the Senate bill granted the Commission the ability to look at both diversity and competition concerns in individual radio license transfer cases.

Clear Channel then goes on to claim that the compromise worked out between the House and Senate conferees, Section 202(b), embodies the total sum of Congress' diversity and

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[9]*See* S. 652, 104th Cong. §206(b)(2) (1995).

[10]*See id.*

[11]*Id.*

[12]Clear Channel Comments at 7(emphasis added).

[13]S. 652, 104th Cong. §206(b)(2) (1995).

competition concerns for local radio markets.[14] Clear Channel, however, never cites any authority for its proposition that the legislative history supports its contention that Section 202(b) occupies the entire field of radio license transfer review.[15] On the other hand, the plain language of Section 202(b) appears to indicate that the Senate view prevailed over the House position in two areas. First, the titles of Section 202(b) evidence traditional diversity concerns. Section 202(b) is entitled "Local Radio Diversity," unlike certain other provisions of Section 202(b) that contain the words "elimination" or "relaxation" in their titles.[16] The use of "diversity" in the title would appear to embody the Senate's concerns about diversity in individual radio markets, as opposed to the other sections headings that utilize "elimination" or "relaxation, " which would appear to more closely approximate the House view.[17] Second, Section 202(b)(1) is entitled "Applicable Caps," which also appears to evidence the Senate's broader diversity concerns by

[14]Clear Channel Comments at 7 (concluding that "it is not difficult to discern how Section 202(b) emerged from the Conference Committee, bearing in mind the presumption of rationality and coherence").

[15]*Id.* at 8 ("A natural compromise would have included the retention of some limit on local radio ownership, more permissive than the Commission's existing rule yet strict enough to allay the Senate's concentration concerns, and a limited role for the FCC."). Notwithstanding the fact that Clear Channel provides no support for this proposition, it is also important to note that this statement completely ignores the fact that Section 206(b)(2) of the Senate bill actually envisioned a more expansive case-by-case analysis of radio transactions by the Commission.

[16]Pub. L. No. 104-104, §202(b), 110 Stat. 110. *But see* Pub. L. No. 104-104, §202(f)(1), 110 Stat. 110 (provision requiring the Commission to "permit a person or entity to own or control a network of broadcast stations and a cable system" titled "Elimination of Restrictions"); Pub. L. No. 104-104, §202(d), 110 Stat. 110 (provision requiring Commission to loosen its "one-to-a-market ownership rules" titled "Relaxation of One-To-A-Market).

[17]*See* Almendarez-Tores v. United States, 523 U.S. 224, 234 (1998) (*citing* Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528-29) (stating that '"the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute'").

ensuring an absolute cap on the number of radio stations one entity can own in a local market.[18] This is further reinforced by the actual language in the statute, which states that parties may own "up to" a certain number of stations, indicating an intention by Congress to prohibit ownership over the limits delineated in Section 202(b), with certain limited exceptions, but not prohibiting the Commission from blocking certain transactions that, while in technical compliance with Section 202(b), would not serve the public interest.[19]

Furthermore, by focusing only on presumptive levels of local radio market "diversity," the Conference Committee version of Section 202(b) preserves the Commission's traditional competition and anti-trust review functions for two reasons. First, Section 202(b) does not contain the flat prohibition on Commission rules "prohibiting or limiting" multiple broadcast station ownership that was contained in Section 337(a)(1) of the House Bill.[20] Second, Section 202(b) also does not contain the Senate's specific provision allowing the Commission to conduct "case-by-case" analysis of competitive concerns in local markets.[21] Accordingly, the elimination of either the specific House or Senate provisions dealing with competitive concerns would appear

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[18]Pub. L. No. 104-104, §202(b)(1), 110 Stat. 110.

[19]UCC notes that Congress had ample opportunity, in amending the Communications Act of 1934, to amend Sections 309(a) and 310(d) to exclude radio licensing from applications subject to a "public interest" review. In fact, Congress had ample opportunity to do so when it added subsection (k) to Section 309 as part of the 1996 Act. *See* S. Conf. Rep. No. 104-230, at 164 (noting that "new subsection (k). . . gives the incumbent broadcaster the ability to apply for its license renewal without competing applications"). Congress did not, however, amend Section 309(a), which means that the Commission's traditional public interest mandate regarding radio license transfers remains.

[20]H.R. 1555, 104th Cong. § 337(a)(1) (1995).

[21]S. 652, 104th Cong. §206(b)(2) (1995).

to indicate that the Conference Committee intended to leave the Commission's existing[22] authority intact. This view is further supported by Section 601(b)(1) of the Act, which states that "nothing in this Act or the Amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."[23]

The complete legislative history underlying Section 202(b) clearly evidences Congress' desire to set some presumptive local radio limits, while still preserving the Commission's traditional public interest mandate and anti-trust authority. Accordingly, on the basis of the legislative history alone, UCC urges the Commission to reject the overly restrictive reading of Section 202(b) advanced by Clear Channel, NAB and other industry commenters.

B. Fundamental Principles of Statutory Construction Require That Section 202(b) Be Read in Conjunction With the Commission's Public Interest Requirement

In addition to misconstruing the legislative history underpinning Section 202(b), both Clear Channel and NAB also ignore traditional rules of statutory interpretation by suggesting that Section 202(b) somehow "swallows" other sections of the Act that specifically preserve the Commission's authority to review broadcast license transactions for possible competitive concerns and to ensure that broadcast license transfers serve the public interest. One fundamental principle of statutory interpretation is that different statutory provisions should be read together whenever possible, and that a "positive repugnancy" must exist between two

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[22]UCC notes that Commission precedent also supports this interpretation. *See* CHET-5 Broadcasting, L.P., 14 FCC Rcd 13041, 13043 ("We agree that the Commission has an independent obligation to consider whether a proposed pattern of radio ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local radio market and thus, would be inconsistent with the public interest.").

[23]Pub. L. No. 104-104, §601(b)(1), 110 Stat. at 143.

statutory provisions for one provision to give way to another.[24] In this case, Section 202(b) required the Commission to revise its radio ownership limits to allow a party to "own, operate or control *up to*" a certain number of radio stations in a market.[25] As discussed above, this is starkly different from other provisions in Section 202, such as Section 202(c)(1)(A), which required the Commission to eliminate[] the restrictions on the number of television stations" that a party could control nationwide.[26] Therefore, while a statutory section directing the Commission to completely eliminate a rule or restriction could be seen as "repugnant" to other sections of the Act, Section 202(b), which requires the Commission to modify its rules to allow ownership of "up to" a certain number of broadcast stations, can and must be read in conjunction with other Sections of the Act, such as Sections 309 and 310, which require that an overall transaction serve the "public interest" of listeners in an affected area.[27]

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[24]TVA v. Hill, 437 U.S. 153, 190 (1978) (*citing* Wood V. United States, 16 Pet. 342, 263 (1842) (noting that there must be a "positive repugnancy" between the old and new laws); see *also* Sutherland Stat. Const. § 51.02 (5th ed. 1992) ("Statutes for the same subject, although in apparent conflict, are construed to be in harmony if reasonably possible.").

[25]Pub. L. No. 104-104, §202(b)(1), 110 Stat. 110.

[26]*Id.* at § 202(c)(1)(A).

[27]*See* Air Virginia, Inc. (Assignor) and Clear Channel Radio Licenses, Inc. (Assignee) For Consent to the Assignment of the License of WUMX (FM), Charlottesville, VA, Hearing Designation Order, File No. BALH-20000403ABI, MM Docket No. 02-38 (rel. Mar. 19, 2002) (Separate Statement of Chairman Michael K. Powell).

> In short, the Communications Act does not permit the Commission to turn a deaf ear to radio listeners. Thus, while our competitive analysis is informed by antitrust principles, our ultimate obligation is to consider the potential benefits and harms of the transaction on the listening public. Where we find evidence that a proposed transaction will benefit listeners, we must weigh that factor against the potential harm to advertisers in determining whether the transaction is consistent with the public interest.

II. Local Radio Ownership Consolidation Has Not Increased the Diversity of Programming Available to the Public

Some industry commenters claim that radio ownership consolidation is in the public interest because it has resulted in an increase in the number of commercial radio stations available to the public. However, the main study relied on by the industry -- conducted by BIA Financial Network ("BIA") at the request of the NAB ("BIA Format Study") -- fails to show a substantial increase in local radio formats.[28] In fact, that study indicates that most markets have added at most only one additional format since 1996. Even assuming, however, that the addition of approximately one format per market can be considered a "significant" increase, the industry commenters provide no support to actually show that this increase was caused by industry consolidation.

Furthermore, for the past twenty years, the Commission's public interest analysis of local radio licensing transfers has focused on a merger's effect on news, public affairs and other informational programming that is responsive to local community needs. The BIA Format Study does not show that this type of programming has increased or become more diverse as a result of ownership consolidation. Accordingly, should the Commission base its decision in this case on format "diversity," it will not only have to explain why increasing formats is in the public

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> We must also examine whether particular or unique circumstances of a market might mitigate the potential harm from such high levels of concentration. But where we cannot find an overall benefit to listeners or mitigating factors, *we have no basis on which to conclude that the transaction will serve the public interest.* In those cases, we must designate the application for hearing.

Id. (emphasis added).

[28] *See* NAB Comments at Attachment A (hereinafter "BIA Format Study").

interest, but also return to its previous practice of allowing challenges to local radio mergers that eliminate unique formats.

A. The BIA Format Study Fails to Demonstrate a Substantial Increase in the Number of Formats Available to the Public

In support of its theory that radio station consolidation has somehow increased "programming diversity" available to the public, the NAB attached a copy of the BIA Format Study to its initial comments.[29] The NAB claims that the BIA Format Study "clearly demonstrates that the number of programming formats provided in Arbitron radio markets has continued to increase and that a causal link exists between increased ownership consolidation and increased program diversity."[30] Specifically, the BIA Format Study claims that "since 1998, the average number of general program formats offered in all Arbitron surveyed markets has increased 8%, and the average number of specific programming formats has increased by 11.1%."[31] As detailed below, both the methodology and findings of the BIA are questionable.

1. The BIA Study Shows that Increases in the Number of Formats Are Minimal at Best

The BIA Format Study first examines the number of different "general" formats available in markets of different sizes.[32] To calculate the number, the BIA Format Study places all

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[29] *See id.*

[30] NAB Comments at 20.

[31] *Id.* at 21-22.

[32] The 19 different general formats are listed in BIA Format Study, n. 7.

stations into one of nineteen "general" format categories,[33] as determined by BIA. It finds that the average number of general formats in the top ten markets, where a very large proportion of the listening audience resides, increased by 0.7, *i.e.*, from 16.3 in 1996 to 17.0 in 2001.[34] The average increase in markets 11-25 was only slightly higher at 0.9.[35] Indeed, the largest increase, which occurred in the smaller (51-100 and 100+) markets, was a mere 1.3.[36] Increases of this magnitude can hardly be considered significant, especially in light of the fact that the BIA Format Study grouped stations according to its own subjective format classifications.[37]

These results are similar to the findings made by UCC in the study submitted in its initial comments.[38] The markets studied by UCC showed an average increase of 1.5 formats from 1993 to 2001, notwithstanding the average increase of 5.7 radio stations per market.[39] The slightly higher average is probably due to the fact that UCC compared data from 1993 with the data from

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[33]UCC notes that it is impossible to critique the station placement methodology because BIA does not include a market-by-market summary detailing the placement of specific stations in the "general" format categories.

[34]*See* BIA Format Study at 5.

[35]*See id.*

[36]*See id.*

[37]*See* BIA Format Study at 3. On one hand, BIA admits that it is "extremely difficult to classify radio formats into nice, neat categories." *Id.* Notwithstanding that statement, however, the BIA Format Study states that "BIAfn categorizes the many different formats into nineteen general groups." *Id.* at 4.

[38]*See* UCC Comments at Attachment 3 (hereinafter "UCC Format Change Study"). UCC examined format changes in fourteen states within seventeen markets: five large markets, five medium, five small, as well as Syracuse, NY and Rockford, IL (*citing Investing in Radio* 1994, BIA Publications, Inc. (1st Edition, 1994) and *Investing in Radio 2001*, BIA Publications, Inc. (3rd Edition, 2001)).

[39]*See id.*

2001, while the BIA Format Study compared 1996 data with data from 2001. But more importantly, UCC's study, unlike the BIA Format Study, also examined the increase in the number of stations. Because the number of stations increased substantially, one would have expected a similar increase in the number of formats. Furthermore, the fact that formats increased only slightly while the number of stations increased by a larger amount suggests that increasing ownership concentration may have actually reduced the number of formats that would have otherwise been available to the public.

Perhaps recognizing that the increase in general formats was less than impressive, the BIA Study next examines the increase in "specific" formats.[40] It is not clear, however, what the term "specific format" means. Although BIA lists the nineteen general format categories, it does not list or identify the number of specific format categories relied upon in its analysis. The BIA Study's only explanation is it employed "the specific format categories (*e.g.*, "Urban AC") actually used by station personnel in characterizing their stations' formats. Stations with mixed formats were classified as having different formats than stations with either of the components."[41] Thus, it seems entirely possible that any increase in the number of "specific" formats is due to station personnel subdividing or re-naming of formats, or the addition of a new format, not consolidation of ownership.[42]

The methodology underlying the BIA Format Study is further complicated by the fact that

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[40]BIA Format Study at 6.

[41]*Id.*

[42]Even counting specific formats, the in number of formats is not very high compared to the number of stations.

the study contains a number of "out-of-market" stations in each of the Arbitron markets studied. The BIA Format Study asserts that "there is a considerable amount of listening in markets to stations that are not listed by Arbitron as being home to that market."[43] It thus counts any station that achieves a one percent or greater share in the non-home market.[44] Even with out-of-market stations included, there is no increase in the number of formats available in top 10 markets and only modest increases in the smaller markets.[45] While the BIA Format Study claims that these numbers when weighted by population represents a 2.1% increase in general formats,[46] this figure is inherently misleading because by definition, the out-of-market station can only be received by a small fraction of the community. In sum, once the questionable claims are eliminated from the BIA Format Study, there is very little support for finding an increase in the number of radio formats available to the public.

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[43]BIA Format Study at 9. By including out-of-market stations in a portion of its study, BIA does not adhere to its generally accepted media market boundary definition and ignores the standard it uses in its own *Investing in Radio Quarterly Market Reports*. *See* Definition of Radio Markets, Notice of Proposed Rule Making, 15 FCC Rcd 25077, 25081 (2000)(noting Arbitron-defined markets "attempt to reflect accurately the location of a station's listeners and the identity of stations that are actually perceived by advertisers to be in a market") Advertisers have relied on Arbitron data for over 15 years. *See* Investing in Radio 2001, BIA Publications, Inc (3rd Ed. 2001) at 6 (noting that *Investing in Radio* has been in publication since 1986). The Department of Justice ("DOJ") also utilizes Arbitron markets when analyzing the competitive effects of a proposed acquisition. *See* U.S. Department of Justice, Comments in Response to Public Notice No. 92809, Application of Citadel Communications Corporation and Marathon Media L.P. for Consent to Assignment of Licenses of Stations, at 18 (filed April 26, 1999) (noting that both the DOJ and the radio industry rely on BIA's *Investing in Radio* report as recognizing the "relevant geographic market which media buyers would consider close substitutes").

[44]BIA Format Study at 11.

[45]*Id.* at Table 5 (showing 0.5 increase in markets 11-25, 0.9 increase in markets 26-5, 1.1 increase in markets 51-100 and 1.4 in markets 101+).

[46]BIA Format Study at 12.

2. The BIA Format Study Fails to Demonstrate That Any Format Diversity Is Caused By Ownership Consolidation

Even if one considers the modest increases in formats claimed by the BIA Format Study to be significant, the BIA Format Study fails to show, despite NAB's claims to the contrary,[47] that any increase in format diversity has been caused by increased consolidation. As a primary matter, it must be noted that the mere existence of correlated variables does not mean that one causes the other.[48]

Moreover, there are significant problems with the BIA Format Study's "regression analysis."[49] It overstates the effect consolidation has had on format diversity by failing to consider many other factors, such as an increase in population, changes in demographics, or re-classification of format categories, that could additionally account for the increases in format availability.[50] For example, market size is a variable that may have an effect on consolidation and format diversity. This issue, however, is wholly neglected in BIA's regression analysis. Furthermore, exclusion of relevant variables from the simple regression equation creates estimates that, on average, are too large.[51] In fact, the BIA Format Study itself admits many of

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[47]NAB Comments at 20.

[48]*See* DAMODAR N. GUJURATI, BASIC ECONOMETRICS 20 (Scott D. Stratford & Lucille H. Sutton eds., McGraw-Hill, Inc., 3d ed. 1995)(stating that "a statistical relationship *per se* cannot logically imply causation").

[49]BIA Format Study at 13-17.

[50]*See* BIA Format Study at 14 (noting that the variables used in BIA's regression model were limited to market concentrations, race and media income).

[51]*See* JEFFREY M. WOOLDRIDGE, INTRODUCTORY ECONOMETRICS: A MODERN APPROACH 90 (2000). If an important variable (market size) that affects the dependent variable (number of formats in a market) is omitted from the regression equation, the existing variables in the

these methodological failures by noting that the study has produced "some confusing results."[52]

In an era when the Commission correctly emphasizes the need for empirical data, it is crucial for quantitative studies to accurately capture and control for consolidation's effect on diversity in the marketplace. When examined closely, it is clear that the BIA Format Study both overstates the increases in formats available to the public and furthermore fails to demonstrate that any increases are caused by increased ownership concentration. In sum, it provides no reasonable basis for the Commission to allow greater concentration of ownership in the radio industry.[53]

B. Under Longstanding FCC Policy, A Radio Station's Format Is Largely Irrelevant to Whether the Station Is Serving the Public Interest

Even if it could be demonstrated that a reduction in the number of radio station owners caused an increase in the number of radio formats, it is not clear that this result is relevant to the public interest determination that the Commission is required to make in this proceeding.[54]

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regression (such as the impact of concentration) may be inflated, reflecting a stronger relationship than actually exists. *See id.*

[52]BIA Format Study at 15.

[53]In addition to concerns over faulty methodology, UCC is also troubled by the fact that BIA, which supplies much of the raw statistical information used by the Commission in broadcast licensing and rulemaking proceedings, drafted two "custom" studies for the NAB for use in this proceeding. UCC believes that BIA's "dual roles," as a provider of raw data on one hand and a consulting firm on the other, inherently create a conflict of interest that should be examined by the Commission.

[54]Moreover, the minimal increase in the number of formats carries a huge price in terms of loss of diverse owners. Viacom data indicate "the number of formats in a market increases by one when the number of owners in a market declines by seven." *See* Viacom Comments at App. C, ¶37. Thus, local radio markets will lose several independent owners to gain just one format. New York, NY, for example, added 18 radio stations to its market, lost seventeen independent owners, but only received a net increase of one format. *See* UCC Format Change Study. Given

While a variety of entertainment formats may benefit the public, the Commission's long-standing practice has been only to consider whether radio licensees have provided programming responsive to community issues.[55]

For the past 25 years, format has been largely irrelevant in making the public interest finding the Commission is required to make when considering an assignment, renewal or transfer application.[56] The Commission has a "long and continuing reluctance to define and enforce the 'public interest' in entertainment format preservation."[57] Furthermore, the Supreme Court has affirmed the Commission's policy that evaluation of entertainment format changes is not the correct public interest inquiry for the Commission to engage in.[58] Instead, the Commission is obligated to make certain that licensees are able to determine community needs and provide

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the increasing number of radio stations and a substantial loss of independent owners, one format can hardly be said to be a significant increase.

[55]*See* Deregulation of Radio, *Report and Order,* 84 FCC2d 968, at 971, ¶9 (1981) (hereinafter "Deregulation of Radio"), *aff'd,* 87 FCC2d at 804 (1981), *aff'd in part and rev'd in part, Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) (stating "licensees seeking renewal are only obligated to determine the issues facing their community").

[56]In the Matter of Development of Policy Re. Changes in the Entertainment Formats of Broadcast Stations, Memorandum and Order, 66 FCC2d 858, 861, ¶9 (1976) (hereinafter "Entertainment Format Policy Statement"), *recon. denied*, 66 FCC2d 78 (1977), *aff'd, FCC v. WNCN Listeners Guild et al.*, 450 U.S. 582 (1981) (emphasizing the Commission "must refrain from the detailed supervision of entertainment formats").

[57]*See id.* at ¶11.

[58]*See FCC v. WNCN Listeners Guild et al.* at 590 (affirming the Commission's decision that the "market is the allocation mechanism of preference for entertainment formats and . . .Commission supervision in this area will not be conducive . . . to producing program diversity").

responsive programming.[59] Therefore, the appropriate public interest inquiry for diversity in local radio markets centers around whether or not local radio owners are responding to local issues through local informational, news, and public affairs programming rather than entertainment programs.[60]

None of the studies provided by industry commenters have demonstrated that increased consolidation has led to more responsiveness with local issues or more local information, news, or public affairs programming. To the contrary, increased ownership consolidation has led in many cases to nearly identical programming in multiple markets instead of providing greater opportunity for diverse local content. For example, a review of Clear Channel's programming[61] in six major metropolitan markets found that the stations were airing virtually identical programming.[62]

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[59]*See* Deregulation of Radio at 978, ¶26 (1981) (stating "we do expect, and will require, radio broadcasters to be responsive to the issues facing their community").

[60]While Viacom attempted to study the evolution of community access to locally oriented news and information over the past five decades, UCC rejects this study as fatally flawed due to Viacom's inclusion of various media outlets that are not relevant for this local radio diversity proceeding. *See* discussion *infra* Part III.

[61]*See* Clear Channel Comments at 17.

[62]*See* Attachment 1 (detailing the virtually identical daily programing schedules for six Clear Channel stations in the following markets (Arbitron ranking in parentheses): Pittsburgh, PA (22), Cincinnati, OH (26), Rochester, NY (53), Cleveland, OH (24), Tulsa, OK (64), and Chicago, IL (3)). UCC also notes that while Clear Channel is very adept at using its own personnel to "mass-program" large numbers of its stations within certain formats, Clear Channel does not appear to be willing to use other programming providers who might provide a different "voice." *See Westwood O'Reilly Launch Biggest Ever Talk Show With No Clear Channel Affiliates*, INSIDE RADIO, May 8, 2002, at 1 (stating that "the obvious word throughout Clear Channel is to boycott the show that is likely to hurt its own Rush Limbaugh Show"). This would appear to directly contradict Clear Channel's statements in its initial comments that "Clear Channel corporate management does not play a role in determining the content of news and

Thus, in the absence of a change in policy, the FCC has no record to support allowing even greater concentration. If the Commission chooses to repudiate its longstanding policy and concludes that radio station format is an important aspect of the public interest, it will no longer be able to "refrain from the detailed supervision of entertainment formats."[63] Indeed, it would need to define what constitutes a particular entertainment format and what differentiates it from a neighboring format.[64] Given the large number of format changes documented in the proceeding,[65] review of format changes will impose significant regulatory burdens. The Commission will have to engage in a highly individualized review of radio mergers and their effect on programming that is offered in a specific market. In the past, the Commission found such a process to be highly burdensome and inefficient.[66]

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public affairs programming aired on its stations." Clear Channel Comments at 16.

[63]Entertainment Format Policy Statement at 861, ¶13 (claiming there are "acute practical problems" associated with monitoring substantive format changes that would have "far-reaching ramifications for [the Commission's] entire scheme of radio broadcasting licensing").

[64]*See id.* For example, the Commission would be required to distinguish progressive rock music from another species of rock genre, and may even be obliged to distinguish between 19th Century and 20th Century classical music, and make, in the context of applications, "very real consequences turn on such distinctions." *Id.*

[65]*See e.g.* NAB Comments at Attachment B, at 39 (noting over 300 stations in Arbitron markets changed their formats between Fall 2000 and Spring 2001).

[66]*See* Entertainment Format Policy Statement at 865,¶21 (adhering to the view expressed "that [the Commission's] regulation of entertainment formats as an aspect of the public interest would produce an unnecessary and menacing entanglement. . .").

C. Consolidation Has Made Entry More Difficult For Minorities, Women, and Other New Voices

Consolidation has also resulted in less diverse programming for the public through its effect on minority and female radio station ownership. UCC shares the concerns of several commenters about the impact increased consolidation in the radio industry has had on ownership by minorities and women.[67] Given the small number of minority owners to begin with, the net loss of 20 minority owners between 1997 and 2001, which was documented in the study attached to the Minority Media and Telecommunications Council's ("MMTC") Comments, is quite troubling.[68] UCC also agrees with American Women in Radio and Television's ("AWRT") comments urging the Commission to compile the raw data it has on file to provide a baseline for determining the impact of consolidation on ownership of radio stations by women.[69]

Ownership limits provide a race-neutral method for promoting ownership opportunities for women and minorities. Radio ownership limits are particularly important because the lower entry costs for radio, as compared to broadcast television, cable television, or newspapers, provides a means for new entrants, particularly minorities and women who have less access to capital. Unfortunately, the increased ownership consolidation increases entry costs and makes it increasingly difficult for many minority and female owned stand-alone stations to survive.

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[67] *See, e.g.*, Comments of the National Association of Black Owned Broadcasters, Inc.; Comments of the Minority Media and Telecommunications Council (hereinafter "MMTC Comments"); and Comments of American Women in Radio and Television (hereinafter "AWRT Comments").

[68] *See* MMTC Comments, App. 1 at 3.

[69] *See* AWRT Comments at 8.

III. The Viacom/Pritchard Study Fails to Demonstrate Any Increase in Independently-Owned Local Media To Offset the Massive Decline in Radio Diversity

In its initial comments, Viacom claims that ownership caps are no longer necessary to promote viewpoint diversity.[70] In support of this claim, it attaches a study conducted by David Pritchard of the University of Wisconsin ("Viacom/Pritchard Study").[71] The Viacom/Pritchard Study purports to "demonstrate that the public has access to far more locally oriented media outlets than ever before and that these outlets have proliferated at an exponential rate following the 1996 Act."[72]

The Viacom/Pritchard Study attempts to identify "increases in outlets for news and information about local events in five American communities from 1942 to early 2002."[73] The data were gathered by five graduate students in an effort "to recreate the range of local media outlets readily available to a resident of a typical neighborhood."[74] The survey counted daily newspapers, other print media, AM radio, FM radio, broadcast television stations, cable channels, media websites, and other websites, to determine the total number of media outlets.[75] There are multiple problems with this approach.

First, the study fails to identify what publications, stations, websites or other outlets were

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[70]*See* Viacom Comments at 21.

[71]*See* Viacom Comments at App. A (hereinafter "Viacom/Pritchard Study").

[72]*See* Viacom Comments at 25.

[73]Viacom/Pritchard Study at 2.

[74]*See id.* at 9.

[75]*See, e.g., id.* at 11, Table 1.

counted. This makes it impossible to verify the results. Determining whether a source should be counted is obviously a matter of subjective interpretation. This is particularly the case where researchers are attempting to "recreate" what would have been available sixty years ago. Yet these subjective determinations were made by graduate research assistants who "physically visited the target neighborhood . . . and listened on car radios to each audible radio station that was considered . . . [to carry] locally oriented programming *of some sort*."[76] However, without identifying the actual outlets counted, it is impossible to assess whether the determinations as to which sources provided local informational programming were reasonable.

Another serious problem with the Viacom/Pritchard Study is that it appears to count as separate voices outlets that are commonly owned and/or operated. For example, all of the markets studied have multiple radio stations, but there is no evidence that the numbers were adjusted to reflect common ownership. In addition, "media websites" as well as "other websites" were separately counted, even though presumably the "media websites" are affiliated with a newspaper or broadcast station. As UCC demonstrated in its initial comments, diverse and antagonistic viewpoints are more likely to come from separately-owned radio entities.[77] By failing to recognize common ownership, the Viacom/Pritchard Study overstates the number of diverse outlets.

Finally, most of the increase in the number of media outlets since enactment of the1996

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[76] *Id.* (emphasis added).

[77] See Comments of the Office of Communication, Inc. of the United Church of Christ at 4-8. *See* also Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making, 10 FCC Rcd 3524, 3550 (1995) (noting the Commission has explicitly stated "source" diversity, having a variety of program producers and owners, is the most important factor in ensuring broadcasting diversity).

Act can be accounted for by websites. For example, from 1995 to 2002, 26 out of the 30 media outlets added to the Lisbon, North Dakota market[78] and 27 out of the 31 added to the Rockville, Illinois market[79] are attributed to websites. However, the Study fails to provide any specifics about the websites counted. It neither identifies the operators of the websites nor the origin of the information they present. Moreover, there is no evidence that local residents are actually availing themselves of these media websites. Without this information, it is impossible to assess whether the websites in fact offer local information and whether people in those communities know about and use them on a regular basis.

In sum, the Viacom/Pritchard Study is riddled with methodological problems and is completely unverifiable. Since it does not adequately measure independent voices in the local radio market, it provides no basis for any further relaxation of the radio ownership rules.

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[78] *See* Viacom/Pritchard Study at 11.

[79] *See id.* at 16.

CONCLUSION

Massive consolidation in local radio markets has led to a substantial decline in source diversity and the availability of local news and public affairs programming that is actually responsive to local communities. Furthermore, the substantial decline in responsive programming cannot be countenanced by flawed industry studies claiming that consolidation has "resulted" in the addition of approximately one new radio format per local radio market. Accordingly, UCC again urges the Commission to adopt the proposals delineated in its initial comments.

Respectfully submitted,

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Dated: May 8, 2002

ATTACHMENT

Attachment 1	Daily Programming Schedule for 6 Clear Channel CHR/ "Kiss" Format Stations

Attachment 1

Daily Programming Schedule for 6 Clear Channel CHR/ "Kiss" Format Stations

WKST-FM, Pittsburgh, PA - "KISS 96.1" (available at www.kissfm961.com)

5-9 a.m.	"Valentine in the Morning"
9-10 a.m.	David Jaye
10 a.m.-3 p.m.	Randi West
3-7 p.m.	Trout
7-11 p.m.	Tone.E. Fly
11-12 p.m.	Carson Daily

WKFS-FM, Cincinnati, OH - "KISS 107" (available at www.kiss107fm.com)

6-9 a.m.	"Valentine in the Morning"
9 a.m - 1p m.	Randi West
1-4 p.m.	Fish
4-7 p.m.	B.J Wilde
7p.m. -Midnight	Tone E. Fly

WKGS-FM, Rochester, NY - "KISS 106.7" (available at www.kiss1067.com)

5-9 a.m.	"Valentine in the Morning"
9 a.m. - 2p.m.	Randi West
2-7 p.m.	B.J. Wilde
7- 8 p.m.	Carson Daily
8 p.m.- Midnight	Java Joel

WAKS-FM, Cleveland, OH - "KISS 96.5" (available at www.kissfm965.com)

5-9 a.m.	"Valentine in the Morning"
9 a.m. - 2 p.m.	Randi West
2 - 7 p.m.	Dan Mason
7 - 10 p.m.	Kasper
10 - 11 p.m.	Carson Daily

KIZS-FM, Tulsa, OK - "KISS 92.1" (available at www.kiss921.com)

6-10 a.m.	"Valentine in the Morning"
10 a.m.- 3 p.m.	Randi West
3-8 p.m.	Unknown
8-11 p.m.	"Matt the Bratt"

WKSC-FM, Chicago, IL - "KISS 103.5" (available at www.kiss1035.com)

5- 10 a.m.	"Valentine in the Morning"
10 a.m. - 2 p.m.	Randi West
2 p.m. - 6 p.m.	Rick Party
6- 11 p.m.	Java Joel
11 p.m. - Midnight	Carson Daly

CERTIFICATE OF SERVICE

I, Janelle Hu, hereby certify that I have on this Eighth Day of May, 2002, sent via U.S. Mail, postage prepaid, copies of the "Reply Comments of the Office of Communication, Inc. of the United Church of Christ" to the following:

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